PD-0026-21
COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
Transmitted 6/14/2021 4:39 PM
Accepted 6/15/2021 8:14 AM
DEANA WILLIAMSON
CLERK

No. PD-0026-21

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

FILED
COURT OF CRIMINAL APPEALS
6/15/2021
DEANA WILLIAMSON, CLERK

CHRISTOPHER JAMES HOLDER, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Collin County
Trial Cause 416-80782-2013
Appeal No. 05-15-00818-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

STACEY M. SOULE
State Prosecuting Attorney
Bar I.D. No. 24031632

EMILY JOHNSON-LIU
Assistant State's Attorney
Bar I.D. No. 24032600

P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512-463-1660 (Telephone)
512-463-5724 (Fax)

GREG WILLIS
Collin County Criminal District Attorney
Collin County, Texas

LIBBY LANGE
Assistant Criminal District Attorney
Bar I.D. No. 11910100

2100 Bloomdale Rd., Suite 200
McKinney, Texas 75071
llange@co.collin.tx.us
972-548-4323 (Telephone)

IDENTITY OF JUDGE, PARTIES, AND COUNSEL

* The parties to the trial court's judgment are the State of Texas and Appellant Christopher Holder.

* The trial judge was Hon. Chris Oldner, Presiding Judge, 416th District Court, Collin County, Texas.

* Appellant was represented in the trial court, the Court of Appeals, and this Court in PD-1269-16 by Steven Miears, 414 N. Main, Suite 103, Grapevine, Texas 76051. He was also represented in the trial court by Keith Gore, 2301 West Virginia Pkwy, McKinney, Texas 75071.

* The State was represented at trial by Assistant District Attorneys Cynthia Walker and Wes Wynne, 2100 Bloomdale Rd., Suite 200, McKinney, Texas 75071.

* Counsel for the State in the Court of Appeals was Assistant District Attorney Libby Lange, 2100 Bloomdale Rd., Suite 200, McKinney, Texas 75071.

* Counsel for the State before this Court in PD-1269-16 were Assistant District Attorney Libby Lange and Appellate Chief John R. Rolater, Jr., 2100 Bloomdale Rd., Suite 200, McKinney, Texas 75071.

* Counsel for the State before this Court are Assistant State Prosecuting Attorney Emily Johnson-Liu, P.O. Box 13046, Austin, Texas 78711, and Assistant District Attorney Libby Lange, 2100 Bloomdale Rd., Suite 200, McKinney, Texas 75071.

TABLE OF CONTENTS

IDENTITY OF JUDGE, PARTIES, AND COUNSEL..... i

INDEX OF AUTHORITIES..... iv

STATEMENT REGARDING ORAL ARGUMENT 2

STATEMENT OF THE CASE.....2

ISSUES PRESENTED.....3

(1) If the error at trial was in admitting evidence under a non-constitutional rule—TEX. CODE CRIM. PROC. art. 38.23—shouldn't harm be assessed under the non-constitutional harm standard in TEX. R. APP. P. 44.2(b)?

(2) If the non-constitutional "substantial rights" standard applies, was the error harmless?

SUMMARY OF THE ARGUMENT 4

ARGUMENT 5

ISSUE 1 5

Statement of Facts 5

Not just any violation will do; the harm standard requires error at trial. 6

The trial error (admitting evidence of the seizure) didn't violate Art. I, § 9. 7

There is no federal exclusionary rule violation at issue. 9

Art. 38.23 error can't be characterized as constitutional. 10

This Court should disavow *Love v. State*'s leap to constitutional harm. 12

The history of the harmless error rule partially explains why this hasn't all been decided before....14

ISSUE 2....19

This Court should conduct a proper harm analysis rather than remand again....19

Factual Background....21

Standard of Review....26

The Existence and Degree of Additional Evidence Indicating Guilt....27

The Nature of the Evidence Supporting the Verdict....31

The Character of the Error and How it Might be Considered in Connection with Other Evidence....34

Appellant was in the Area of Tanner's House when the murder may have occurred....35

Appellant's Cellphone Records Exposed His Lies About his Whereabouts that Weekend....38

Appellant's Cellphone Records Corroborated Uselton's Testimony....40

The State's Jury Arguments....42

Conclusion....46

PRAYER FOR RELIEF....47

CERTIFICATE OF COMPLIANCE....48

CERTIFICATE OF SERVICE....48

INDEX OF AUTHORITIES

Cases

Apodaca v. State, 146 S.W.2d 381 (Tex. Crim. App. 1940), *overruled on other grounds by Olson v. State*, 484 S.W.2d 756 (Tex. Crim. App. 1969).....15

Bessey v. State, 239 S.W.3d 809 (Tex. Crim. App. 2007).....20

Blanton v. State, 369 S.W.3d 894 (Tex. Crim. App. 2012).....16

Brown v. State, 960 S.W.2d 265 (Tex. App.—Corpus Christi 1997, no pet.).....11

Carpenter v. United States, 138 S. Ct. 2206 (2018)..... 2-3, 9

Chapman v. California, 386 U.S. 18 (1967)..... 15-17

Clayton v. State, 235 S.W.3d 772 (Tex. Crim. App. 2007).....27

Coble v. State, 330 S.W.3d 253 (Tex. Crim. App. 2010)..... 26, 42

Contreras v. State, 312 S.W.3d 566 (Tex. Crim. App. 2010) 12

Davis v. United States, 564 U.S. 229 (2011)..... 9-10

Davison v. State, 405 S.W.3d 682 (Tex. Crim. App. 2013) 20

Daugherty v. State, 968 S.W.2d 487 (Tex. App.—Fort Worth 1998, no pet.).....18

Dixon v. State, 595 S.W.3d 216 (Tex. Crim. App. 2020)..... 7, 11, 13-14

Druery v. State, 225 S.W.3d 491 (Tex. Crim. App. 2007 31

Fahy v. Connecticut, 375 U.S. 85 (1963) 16

Flewellen v. State, 29 S.W.2d 779 (Tex. Crim. App. 1930).....15

Ford v. State, 477 S.W.3d 321 (Tex. Crim. App. 2015), *abrogated by Carpenter*, 138 S. Ct. at 2217. 9-10

Garcia v. State, 210 S.W.2d 574 (Tex. Crim. App. 1948) 15

Giglio v. United States, 405 U.S. 150 (1972) 32

Gonzalez v. State, 544 S.W.3d 363 (Tex. Crim. App. 2018)..... 26-27, 40

Guevara v. State, 152 S.W.3d 45 (Tex. Crim. App. 2004).....28, 31

Hernandez v. State, 60 S.W.3d 106 (Tex. Crim. App. 2001)..... 10-11

Holder v. State, No. 05-15-00818-CR, 2016 WL 4421362 (Tex. App.—Dallas Aug. 19, 2016) (not designated for publication), *rev'd*, 595 S.W.3d 691 (Tex. Crim. App. 2020). 2

Holder v. State, 595 S.W.3d 691 (Tex. Crim. App. 2020) 3, 5, 10, 21-26, 29

Holder v. State, No. 05-15-00818-CR, 2020 WL 7350627 (Tex. App.—Dallas Dec. 15, 2020) (not designated for publication)..... 3, 5, 14, 30-31, 42

Hulit v. State, 982 S.W.2d 431 (Tex. Crim. App. 1998) 9

Jackson v. State, 548 S.W.2d 685 (Tex. Crim. App. 1977).....16

Johnson v. United States, 520 U.S. 461 (1997) 7

Kimble v. State, 537 S.W.2d 254 (Tex. Crim. App. 1976).....16

Livingston v. State, No. 02-19-00288-CR, 2020 WL 6165411 (Tex. App.—Fort Worth Oct. 22, 2020, no pet.) (mem. op., not designated for publication).....14

Love v. State, 543 S.W.3d 835 (Tex. Crim. App. 2016)..... 3, 12-14

Maynard v. State, 685 S.W.2d 60 (Tex. Crim. App. 1985).....16

McClintock v. State, 541 S.W.3d 63 (Tex. Crim. App. 2017).....10

Mercier v. State, 322 S.W.3d 258 (Tex. Crim. App. 2010).....6

Merritt v. State, 368 S.W.3d 516 (Tex. Crim. App. 2012).....28

Miles v. State, 241 S.W.3d 28 (Tex. Crim. App. 2007).....8

Motilla v. State, 78 S.W.3d 352 (Tex. Crim. App. 2002).....27

Mouton v. State, 235 S.W.2d 645 (Tex. Crim. App.1950).....15

Nisbett v. State, 552 S.W.3d 244 (Tex. Crim. App. 2018)..... 28, 30-31

Owings v. State, 541 S.W.3d 144 (Tex. Crim. App. 2017).....11

Ex parte Perez, 398 S.W.3d 206 (Tex. Crim. App. 2013)..... 20-21

Potier v. State, 68 S.W.3d 657 (Tex. Crim. App. 2002).....11

Schmutz v. State, 440 S.W.3d 29 (Tex. Crim. App. 2014).....7

Snowden v. State, 353 S.W.3d 815 (Tex. Crim. App. 2011).....6, 16

State v. Cortez, 543 S.W.3d 198 (Tex. Crim. App. 2018).....20

Taylor v. State, 109 S.W.3d 443 (Tex. Crim. App. 2003).....17

Taylor v. State, 268 S.W.3d 571 (Tex. Crim. App. 2008).....11, 20

Thomas v. State, 505 S.W.3d 916 (Tex. Crim. App. 2016).....26

United States v. Marcus, 560 U.S. 258 (2010).....7

United States v. Marion, 404 U.S. 307 (1971).....21

Weeks v. United States, 232 U.S. 383 (1914)..... 7-8

Welchek v. State, 247 S.W. 524 (Tex. Crim. App. 1922)..... 8-10

Wilson v. State, 7 S.W.3d 136 (Tex. Crim. App. 1999).....29

Zamora v. State, 411 S.W.3d 504 (Tex. Crim. App. 2013).....31

Statutes, Codes, and Rules

TEX. CODE CRIM. PROC. art. 18B.5523 14

TEX. CODE CRIM. PROC. art. 21.19 16

TEX. CODE CRIM. PROC. art. 28.10(c) 16

TEX. CODE CRIM. PROC. art. 38.075 32

TEX. CODE CRIM. PROC. art. 38.23(a). 5, 9, 14

TEX. R. APP. P. 44.2(a) 6

TEX. R. APP. P. 44.2(b) 17

TEX. R. APP. P. 66.1 19

Other Authorities

43B TEX. PRAC. § 56:168 (3d ed.) 12

Helen A. Anderson, *Revising Harmless Error: Making Innocence Relevant to Direct Appeals*, 17 TEX. WESLEYAN L. REV. 391, 394 (2011) 16

Notes and Comments, TEX. R. APP. P. 44.2 17

No. PD-0026-21

TO THE COURT OF CRIMINAL APPEALS

OF THE STATE OF TEXAS

CHRISTOPHER JAMES HOLDER, Appellant

v.

THE STATE OF TEXAS, Appellee

Appeal from Collin County
Trial Cause 416-80782-2013
Appeal No. 05-15-00818-CR

* * * * *

STATE'S BRIEF ON THE MERITS

* * * * *

TO THE HONORABLE COURT OF CRIMINAL APPEALS:

Under the federal constitution, the exclusionary rule and Fourth Amendment are synonymous. Because one is implicit in the other and both are constitutionally based, attorneys seldom separate the two. A similar conflation occurs with the Texas Constitution because, while the state constitution has no built-in exclusionary rule, there is a statutory rule, and so the effect is the same—evidence at trial gets

excluded. But constitutional and statutory errors are not synonymous when performing a harm analysis. If only the statutory exclusionary rule would exclude evidence at trial (and not the federal exclusionary rule), a non-constitutional harm standard applies. And under that standard in this case, the erroneous admission of Appellant's cell-site location information (CSLI) was harmless.

STATEMENT REGARDING ORAL ARGUMENT

Oral argument was not granted.

STATEMENT OF THE CASE

Appellant was indicted for capital murder. He moved to suppress the CSLI that the police had obtained from his cell phone provider for violating the Texas Constitution and federal and state stored communication statutes. The trial court denied the motion. The evidence was admitted at trial, and Appellant was convicted.

On appeal, he re-urged the claims. The court of appeals overruled them, and this Court granted review of the federal Stored Communications Act claim. *Holder v. State*, No. 05-15-00818-CR, 2016 WL 4421362, at *13 (Tex. App.—Dallas Aug. 19, 2016, pet. granted) (not designated for publication). While the case was pending in this Court, the United States Supreme Court decided *Carpenter v. United*

States, 138 S. Ct. 2206 (2018). This Court retroactively granted review of the Texas Constitutional claim and reversed the court of appeals. *Holder v. State*, 595 S.W.3d 691, 704 (Tex. Crim. App. 2020). This Court held the seizure of CSLI violated TEX. CONST. art. I, § 9 and, consequently, the trial court erred in not suppressing the records under TEX. CODE CRIM. PROC. art. 38.23. *Id*. On remand to decide harm, the court of appeals held that this Court's decision in *Love v. State*, 543 S.W.3d 835, 846 (Tex. Crim. App. 2016), required it to apply the constitutional harm standard—TEX. R. APP. P. 44.2(a). *Holder v. State*, No. 05-15-00818-CR, 2020 WL 7350627, at *3 (Tex. App.—Dallas Dec. 15, 2020) (not designated for publication). It declared the error harmful under that standard and remanded for a new trial. *Id*. at *7.

ISSUES PRESENTED

(1) If the error at trial was in admitting evidence under a non-constitutional rule—TEX. CODE CRIM. PROC. art. 38.23—shouldn't harm be assessed under the non-constitutional harm standard in TEX. R. APP. P. 44.2(b)?

(2) If the non-constitutional "substantial rights" standard applies, was the error harmless?

SUMMARY OF THE ARGUMENT

The court of appeals erred to apply a constitutional harm standard because the only error that mattered—the one that occurred at trial and that Appellant complained of—was not constitutional. He turned out to be right that collection of his phone records violated TEX. CONST. art. I, § 9. But that Texas constitutional violation does not trigger any harm standard (constitutional or otherwise) because it did not occur at trial. The error was the admission of evidence (CSLI) in violation of Art. 38.23.

The error was harmless under a proper, "substantial rights" standard. The CSLI served three purposes at trial: (1) to show Appellant was in the area of the victim's house when the murder may have occurred; (2) to contradict Appellant's account of his whereabouts; and (3) to corroborate the State's principal witness—Thomas Uselton's—accounts of his and Appellant's movements together. None of these were essential to guilt. Significant other evidence showed that Appellant had committed the murder and lied to the police about where he was, and established his movements with Uselton. Appellant's defensive theory essentially conceded this last point, further reducing the impact of this evidence on Appellant's guilt.

ARGUMENT

ISSUE 1

If the error at trial was in admitting evidence under a non-constitutional rule—TEX. CODE CRIM. PROC. art. 38.23—shouldn't harm be assessed under the non-constitutional harm standard in TEX. R. APP. P. 44.2(b)?

Statement of Facts

Police were investigating the capital murder of a man who Appellant used to live with. With a court order, they obtained 23 days' worth of CSLI from Appellant's cellphone company. After Appellant was indicted for the capital murder, he moved to suppress these records, arguing this was a seizure in violation of TEX. CONST. art. I, § 9 and the federal and state stored communications statutes. CR 47-51, 125-26. The trial court denied the motion. CR 399. The CSLI was admitted at trial. This Court held that decision was erroneous; Art. I, § 9 of the Texas Constitution prohibited seizure of the records in absence of probable cause, and the statutory exclusionary rule, Art. 38.23(a), required exclusion of the records at trial. *Holder*, 595 S.W.3d at 704. And on remand, the court of appeals determined the error was constitutional and applied the constitutional harm standard in Rule of Appellate Procedure 44.2(a). *Holder*, 2020 WL 7350627, at *3.

Not just any violation will do; the harm standard requires error at trial.

Rule of Appellate Procedure 44.2(a) provides:

> If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment.

TEX. R. APP. P. 44.2(a). Like all appellate review, this test for harm deals only with error that has occurred at trial, usually by the trial court. As this Court explained in *Snowden v. State*, "The *parties* do not ordinarily commit error; the *trial court* does, whenever it acts, or fails to act, over the legitimate objection of a party …." 353 S.W.3d 815, 821 (Tex. Crim. App. 2011) (emphasis in original). In a criminal trial, there is no error (or remedy) until evidence is *admitted at trial*, or some other error happens *at trial*. This Court's explanations of Rule 44.2 likewise acknowledge that it is trial error that matters:

> The purpose of Rule 44.2(b) is for appellate courts to determine whether a non-constitutional error that occurred at the trial affected the defendant's substantial rights, and if it did, then the error is reversible. Rule 44.2 does not consider whether the error is a defect of form or a defect of substance; rather it differentiates between constitutional error and other errors.

Mercier v. State, 322 S.W.3d 258, 264 (Tex. Crim. App. 2010).

Because the appellate focus is on error that occurred during the trial, it is not enough that the appellate record reveals a Texas Constitutional violation that occurred in the past (here, when the police first obtained evidence in violation of Art. I, § 9). What triggers the constitutional harm analysis is whether constitutional error occurred during the trial proceedings. Only such errors could conceivably contribute to the conviction or punishment or be subject to harmless error review.[1]

While collecting the records was not a trial error, admission of the records as evidence was. As explained below, however, this error did not violate the Texas Constitution; it only violated Art. 38.23.

The trial error (admitting evidence of the seizure) didn't violate Art. I, § 9.

As Judge Hervey explained in her concurrence in *Dixon v. State*, evidence obtained in violation of Art. I, § 9 and admitted at trial in violation of Art. 38.23 is not constitutional error. 595 S.W.3d 216, 226 (Tex. Crim. App. 2020) (Hervey, J., concurring). A brief comparison to federal constitutional law illustrates why. In *Weeks v. United States*, the Supreme Court held that it violates the Fourth

---

[1] Even errors not subject to harmless error review still have to affect trial. *See Schmutz v. State*, 440 S.W.3d 29, 35 (Tex. Crim. App. 2014) (comparing structural errors, which affect the framework within which the trial proceeds, to non-structural errors that are "simply an error in the trial process itself") (citing *United States v. Marcus,* 560 U.S. 258, 263 (2010) and *Johnson v. United States,* 520 U.S. 461, 468 (1997)).

Amendment not only for government actors to conduct an unreasonable search or seizure but also for the trial court to admit evidence of that search or seizure during a criminal trial. 232 U.S. 383, 393 (1914). The Supreme Court reasoned that the federal constitutional right to be secure against unreasonable searches and seizures was of "no value" if evidence obtained in violation of that right could be admitted into evidence at trial. *Id*. *Weeks* thus created an exclusionary rule built into the federal constitution.

This Court interpreted the Texas Constitution differently. Six years after *Weeks*, this Court in *Welchek v. State* found no explicit or implicit exclusionary rule in the text of Art. I, § 9 and held that Texas valued the rights of the general public to "present all testimony to develop a criminal case" above an individual defendant's privacy or property right. 247 S.W. 524, 528-29 (Tex. Crim. App. 1922). Unlike the federal constitution, the Texas Constitution is not violated by admission of the fruits of a search and seizure violation.

In reaction to *Welchek*, the Texas Legislature created a statutory exclusionary rule—Art. 38.23. *Miles v. State*, 241 S.W.3d 28, 33 (Tex. Crim. App. 2007) (citing S.B. 115, 1925 Tex. Gen. Laws, ch. 49, 186-87, codified as Art. 727a of the 1925 Code of Criminal Procedure). It provides that "[n]o evidence obtained by an

officer… in violation of any provisions of the Constitution… of the State of Texas… shall be admitted in evidence…." TEX. CODE CRIM. PROC. art. 38.23(a). But the Legislature could not overrule *Welchek*'s interpretation of the Texas Constitution. The Texas Constitution continues to *permit* the admission of evidence obtained in violation of Art. I, § 9. *Hulit v. State*, 982 S.W.2d 431, 437 (Tex. Crim. App. 1998). Because of this important difference, the admission of the CSLI evidence at Appellant's trial did not violate the Texas Constitution, only the Texas statutory exclusionary rule.

There is no federal exclusionary rule violation at issue.

Admission of Appellant's CSLI in violation of the Fourth Amendment may have constituted trial error under the federal constitutional exclusionary rule. Admitting CSLI based on a court order supported by only reasonable suspicion certainly would violate the federal exclusionary rule today. *Carpenter* rejected the third-party-doctrine argument that cell phone users have no reasonable expectation of privacy in information revealed to their provider. 138 S. Ct. at 2217. But for a time in Texas, the third-party doctrine expressly permitted obtaining such records without a warrant. *Ford v. State*, 477 S.W.3d 321 (Tex. Crim. App. 2015), *abrogated by Carpenter*, 138 S. Ct. at 2217. Under the governing-law good-faith exception articulated in *Davis v. United States*, 564 U.S. 229, 239-40 (2011), officers

could have reasonably relied on *Ford* that there was no reasonable expectation of privacy in short-term collection of CSLI.

Whether the pre-*Ford* seizure of Appellant's cell phone records would have violated the federal exclusionary rule is not as clear.[2] If it did, the error would have been constitutional. *See Hernandez v. State*, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001) (federal exclusionary rule has constitutional basis and thus Rule 44.2(a) applies). But Appellant did not complain of this on appeal. App. Original COA Brief. Instead, he relied on the Texas Constitution and the federal and state statutes, and this Court remanded to the court of appeals to determine harm from the erroneous admission of evidence under the statutory exclusionary rule. *Holder*, 595 S.W.3d at 704.

Art. 38.23 error can't be characterized as constitutional.

As Presiding Judge Keller first recognized in *Hernandez* (and Judge Hervey reiterated in *Dixon*), "Article 38.23 is a statutory mechanism, not a constitutional

---

[2] *See Davis*, 564 U.S. at 250 (Sotomayor, J., concurring). ("This case does not present the markedly different question whether the exclusionary rule applies when the law governing the constitutionality of a particular search is unsettled."). Had CSLI been the basis for a search warrant, its use would have been sufficiently "close to the line of validity" that any resulting evidence would qualify under the federal and state good-faith exceptions. *See McClintock v. State*, 541 S.W.3d 63, 73 (Tex. Crim. App. 2017).

one, and any error predicated thereon must be analyzed under the standard of harm for non-constitutional errors." 60 S.W.3d at 116 (Keller, P.J., dissenting); *Dixon*, 595 S.W.3d at 226 n.5. It is not enough that Art. 38.23 serves to protect constitutional rights.

This Court's cases have sometimes held an error to reach constitutional dimension even if not all errors in that category would be considered constitutional. These have included:

- limitations on voir dire questioning (which implicates the right to counsel and an impartial jury). *Taylor v. State*, 109 S.W.3d 443, 451-53 (Tex. Crim. App. 2003).
- violations of unanimous verdict by the State's failure to elect an incident. *Owings v. State*, 541 S.W.3d 144, 150 (Tex. Crim. App. 2017).
- and categorical exclusion of evidence implicating right to present a defense. *Potier v. State*, 68 S.W.3d 657, 659 (Tex. Crim. App. 2002).

But unlike in these cases, the error here can't be characterized as one of constitutional magnitude. *Welchek* already determined that admission of evidence in violation of Art. I, § 9 does not violate the Texas Constitution. To hold as the court of appeals in *Brown v. State*, 960 S.W.2d 265, 271 (Tex. App.—Corpus Christi 1997, no pet.)—that a statutory requirement (in *Brown*, Art. 38.22) can't be

separated from the Constitution provision it implements—would essentially reverse *Welchek* or transform a legislative enactment into a constitutional amendment.

What the State is seeking here—a proper analysis of harm—requires no more than consideration of what exactly the trial error is. As straight-forward as that seems, Professors Dix & Schmolesky observe that the analysis sometimes goes wrong:

> Much of the difficulty in accurately identifying errors that should be analyzed for harm arises from failure to recognize the conceptual nature of error. Properly conceptualized, error lies only in action or inaction by the trial court….

43B TEX. PRAC. § 56:168 "Identifying the error for harmless-error analysis" (3d ed.). And this isn't the only context that requires a careful analysis of what is the error and when it has occurred. *See Contreras v. State*, 312 S.W.3d 566, 582 (Tex. Crim. App. 2010) (explaining that *Miranda* violations can only occur with the admission of evidence at trial).

This Court should disavow *Love v. State*'s leap to constitutional harm.

Perhaps because attorneys conflate the Fourth Amendment and the federal exclusionary rule and because, for merits purposes, the state statutory exclusionary rule reaches the same result as the latter, cases have not always been careful to identify the trial error. As Judge Hervey has already identified, *Love* mistakenly

applied the constitutional harm standard to a violation of Art. 38.23. *Dixon*, 595 S.W.3d at 226 (Hervey, concurring). That part of *Love* should be disavowed.

Love was a death-penalty direct appeal that involved the erroneous admission of text messages in violation of both the Fourth Amendment and Art. I, § 9. 543 S.W.3d at 838. This Court stated that a federal good-faith-exception analysis could be avoided because Love also relied on Art. 38.23's narrower good-faith exception (which would not apply) and thus the evidence was inadmissible on state grounds. *Id*. at 846. Turning to harm (and without further explanation), the Court stated, "When the error in question is constitutional, an appellate court must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction or punishment." *Id*. This was a misstep. If the federal-good-faith exception did not apply, Love would have established federal-exclusionary-rule error, which would have properly been analyzed under Rule 44.2(a). But, as articulated above, if only the statutory exclusionary rule was in play, the Rule 44.2(b) harm standard ought to have applied.

One side note*: Love* properly acknowledges that "[b]efore we may invoke the general exclusionary remedy embodied in Article 38.23…we must identify…a constitutional violation." 543 S.W.3d at 846 n.8. This does not mean that the

constitutional violation occurs at trial. A violation of Art. I, § 9 can occur long before trial and still trigger the operation of Art. 38.23(a) at trial. It can also trigger the constitutional-violation exception for exclusivity of remedies under the state stored communications act. *See* TEX. CODE CRIM. PROC. art. 18B.5523. This said, the only violation that matters for purposes of harmless error review is the error occurring at trial. And that is the admission of evidence in violation of Art. 38.23.

Love misled the court of appeals below and the court of appeals in *Livingston v. State*, No. 02-19-00288-CR, 2020 WL 6165411, at *9 (Tex. App.—Fort Worth Oct. 22, 2020, no pet.) (mem. op., not designated for publication) (cited in *Holder*, 2020 WL 7350627, at *3). *Livingston*, which involved evidence taken during a criminal trespass by a private person, did not even involve a constitutional violation at any point in time, much less during trial. It appears to have concluded, based on *Love* and the *Dixon* concurrence, that Art. 38.23 is constitutional in nature. As explained above, that reading is incompatible with *Welchek*.

The history of the harmless error rule partially explains why this hasn't all been decided before.

Although the distinction between statutory and constitutional exclusionary rules has been around since the Legislature created an exclusionary remedy in 1925, this Court has never articulated in a majority opinion the rule the State now seeks.

Part of the reason is that for most of that time since 1925, it did not make a difference because the standard for harm was the same whether the error was statutory or constitutional.

Before *Chapman v. United States*, this Court's cases sometimes applied a harmless error doctrine but articulated no higher standard for constitutional errors. *See, e.g.*, *Flewellen v. State*, 29 S.W.2d 779, 780 (Tex. Crim. App. 1930) (warrantless search of murder defendant's home rendered harmless by his own testimony); *Apodaca v. State*, 146 S.W.2d 381, 382 (Tex. Crim. App. 1940), *overruled on other grounds by Olson v. State*, 484 S.W.2d 756 (Tex. Crim. App. 1969) (court did not "feel warranted in holding that the error in receiving the testimony [in violation of the constitutional privilege against self-incrimination] was harmless"); *Mouton v. State*, 235 S.W.2d 645, 649 (Tex. Crim. App.1950) ("While we will not, and do not, speculate as to the injury in a death penalty case, there must be some probability of injury being shown before we should reverse on an alleged error."). Although the Court refused in at least one instance to find harmless error on the basis that the defendant complained of constitutional error and was given the death penalty, it is not clear that it was creating a higher standard for constitutional error. *See Garcia v. State*, 210 S.W.2d 574, 580 (Tex. Crim. App. 1948).

Then in 1967, the Supreme Court decided *Chapman v. California*, and required for all federal constitutional errors that the conviction or punishment be reversed unless the court could declare beyond a reasonable doubt that the error was harmless. 386 U.S. 18, 21 (1967); *Snowden*, 353 S.W.3d at 818; Helen A. Anderson, *Revising Harmless Error: Making Innocence Relevant to Direct Appeals*, 17 TEX. WESLEYAN L. REV. 391, 394 (2011) (*Chapman* standard more rigorous than all the states' harmless error rules). Thereafter, this Court applied the *Chapman* standard in finding both constitutional and non-constitutional errors harmless. *See, e.g.*, *Maynard v. State*, 685 S.W.2d 60, 67 (Tex. Crim. App. 1985) (applying standard from *Fahy v. Connecticut*, 375 U.S. 85 (1963), which *Chapman* found to be "little, if any, different" from its own); *Jackson v. State*, 548 S.W.2d 685, 693 (Tex. Crim. App. 1977); *Kimble v. State*, 537 S.W.2d 254, 255 (Tex. Crim. App. 1976). There were also special harm standards, specific to a particular kind of error. *See* TEX. CODE CRIM. PROC. arts. 21.19, 28.10(c) ("substantial rights" harm standards for charging-instrument form-defects and improper amendment). In 1986, this Court was granted rule-making authority and adopted rules governing criminal law in the Texas Rules of Appellate Procedure. *Blanton v. State*, 369 S.W.3d 894, 898 (Tex. Crim. App. 2012). The codified rule for harm, former Rule

81(b)(2), continued to maintain a *Chapman*-like standard, regardless of the type of error involved.

It wasn't until 1997 that the Rules of Appellate Procedure made a distinction between constitutional and non-constitutional error. *See Taylor v. State*, 109 S.W.3d 443, 451 (Tex. Crim. App. 2003). The Rules were expressly amended "to limit [the *Chapman*] standard of review to constitutional errors that are subject to harmless error." Notes and Comments, Comment to 1997 change to TEX. R. APP. P. 44.2. Rule 44.2(b) was added to set a lower standard for "other"—*i.e.*, non-constitutional—errors, which would be disregarded if they "do[] not affect substantial rights." With one exception,[3] the revision restricted the prior, universally applicable harm standard to the kinds of errors that were constitutionally mandated under *Chapman* and not to lesser errors that *Chapman* would not apply to. Shortly after this split, one court of appeals applied the new non-constitutional harm standard to an error that would have qualified under the federal inevitable discovery doctrine (and thus was not a federal exclusionary rule violation) but not under Art.

[3] The only type of error that the higher standard appeared to extend to that wouldn't otherwise be required under *Chapman* was for violations at trial of the Texas Constitution.

38.23. *Daugherty v. State*, 968 S.W.2d 487, 489 (Tex. App.—Fort Worth 1998, no pet.). It explained:

> *Garcia* and *Daugherty* make it clear that the inevitable discovery doctrine is inapplicable in Texas not because of a constitutional protection, but rather because it violates a State statute. Our determination, then, that the trial court's error in applying the inevitable discovery doctrine is not of constitutional dimensions. It is an error in statutory interpretation, i.e., the trial court failed to acknowledge that the inevitable discovery doctrine does not apply in Texas due to article 38.23. Tex. Code Crim. Proc. Ann. art. 38.23(a) (Vernon Supp. 1998). Because the error is non-constitutional, we must apply rule 44.2(b).

Id. While the State has not located other decisions making this distinction, it is likely that the issue only occasionally arises because of the similarity between federal and state constitutions and that seldom is only a state-constitutional issue advanced. Regardless, the analysis is proper, and this Court should so hold.

ISSUE 2

If the non-constitutional standard applies, was the error harmless?

The error was harmless under the "substantial rights" standard. While the CSLI was one part of the State's case, it did not provide direct evidence of Appellant's guilt. Also, other more incriminating evidence fulfilled the same evidentiary purposes the CSLI did and that evidence independently and more persuasively demonstrated that Appellant committed the murder. Consequently, the introduction of the CSLI would have had only a slight effect.

This Court should conduct a proper harm analysis rather than remand again.

This Court should determine harm rather than remanding. While a harm analysis is a frequent issue for remand, this is usually because the court of appeals never had occasion to determine harm. That isn't the case here, where harm was the entire purpose of the first remand. Consequently, there is already a decision of the court of appeals for this Court to review. *See* TEX. R. APP. P. 66.1. Going on to determine harm under the appropriate standard would not tread on the court of appeals's role or forgo any additional insight since that court has already shared its view.

In any case, the practice of remanding to the court of appeals first is not an absolute rule. *Taylor v. State*, 268 S.W.3d 571, 592 (Tex. Crim. App. 2008); *see also Bessey v. State*, 239 S.W.3d 809, 813 (Tex. Crim. App. 2007) (considering harm in the first instance without particular reason). One variation from that practice, for example, was in a case like this, where the court of appeals applied the wrong Rule 44.2 standard. *See Davison v. State*, 405 S.W.3d 682, 691-92 (Tex. Crim. App. 2013) (performing Rule 44.2(a) analysis after court of appeals found error harmless under 44.2(b)).

Often, this Court addresses harm when the proper resolution is clear; to do otherwise "would constitute a needless expenditure of judicial resources." *Taylor*, 268 S.W.3d at 592. Here, the judicial economy interests weigh heavily. *See State v. Cortez*, 543 S.W.3d 198, 201 (Tex. Crim. App. 2018) (not wanting to "kick[] the can down the road" when it would involve court of appeals looking at the case a third time). The appeal would have been lengthy even without the prior remand, as it was tried in 2015 and originally affirmed by the court of appeals in late 2016. Remand will come with additional cost. "[D]iminished memories of trial participants and the diminished availability of …evidence" "may often be said to occur beyond five years after a conviction becomes final." *Ex parte Perez*, 398

S.W.3d 206, 216 (Tex. Crim. App. 2013); *see also United States v. Marion*, 404 U.S. 307, 321–22 (1971) (recognizing in the speedy trial context that the passage of time can impair the ability of both parties to present their case). On balance, the circumstances press for resolution of the issue in this Court.

Factual Background

This Court has previously summarized the facts of this case. The remainder of this section sets out that summary (and all footnotes) verbatim:

> In the summer of 2012, Appellant and his girlfriend, Casey James, moved into Billy Tanner's house with James's two children. Tanner was James's ex-stepfather.[4] By October, Appellant's and James's relationship soured, and Tanner asked Appellant to move out. Appellant moved into his tattoo shop in Irving, but James and her daughters continued to live in Tanner's home. In early November, James spoke to Appellant and told him that one of her daughters, C.J., told her that Tanner was "nasty" and that he slept without his underwear. James asked Appellant if he had ever seen Tanner act inappropriately around C.J., and he said that he had. According to Appellant, he never said anything to James though because James was in the room when it happened. James concluded that Tanner had not been inappropriate after she and a friend of hers spoke to C.J. The next time James spoke to Appellant, she

[4] James regarded Tanner like a father because he was the only father figure she ever had.

told him that she would be out of town between November 9 and November 11 and that her kids were going to stay with one of her friends while she was gone.[5]

When James returned to Tanner's home on November 11 at about 8:00 p.m., she thought that something was wrong. The garage-door opener did not work, and Tanner's truck was not at the house, which was surprising because he was normally home at 8:00 p.m. on a Sunday. She entered the house through a sliding glass door in the back, and when she walked in, it was pitch black, which was unusual, and there was a horrible smell. She also noticed that someone had hung a blanket over the sliding glass door that had partially fallen and that there was "liquid running down the hallway." Investigators later discovered that someone had tried to burn the house down.[6] James was afraid and went back to her vehicle where her two children were sleeping. She called her mother, who told her to call the police. James called the police, and they responded to the possible burglary.

Police found Tanner's body in the house. According to one officer, it looked like the body had "been there awhile…." He had suffered blunt-force trauma to the head and was stabbed twenty times. A stab wound to Tanner's neck was inflicted post-mortem, and Tanner had defensive-type wounds on his hands. There was blood all over his body and around it. Police concluded that

---

[5] An investigator for child Protective Services interviewed C.J. a month later and concluded that she was not sexually abused.

[6] When police entered the house, they smelled the strong odor of gasoline and oil. Just inside the entrance to the master bedroom, they found a pile of partially burnt clothes.

the murder was a crime of passion, not a burglary gone wrong, even though Tanner's wallet had been stolen.[7] They also found two black latex gloves on the kitchen table, which James said were not there when she left for the weekend. James had never seen black latex gloves at the house or seen Tanner with black latex gloves. But on Facebook there was a picture of Appellant wearing similar black latex gloves while he was tattooing someone, and DNA testing showed that "it would be extremely unlikely that anyone other than [Appellant] was a major contributor from [the] three glove swabs."

The morning of November 12, police obtained a court order directing AT&T Wireless (AT&T) to disclose call log and CSLI records showing the location of Appellant's cell phone between October 20 and November 12. . . . [After some word changes in the court's order,] AT&T then emailed Plano police 23 days of Appellant's call log and historical CSLI records from between October 20 and November 12.

That same day, police interviewed Appellant and asked him where he was the weekend of November 9 and whether he had his cell phone with him. Appellant responded that he was in Irving and that he had his cell phone with him. Police then confronted Appellant with the CSLI showing that he was in Tanner's coverage area multiple times that weekend, which contradicted his story that he was out of town. Suddenly, Appellant remembered that he was near Tanner's house that weekend, but he was only there to buy drugs and never

[7] Although Tanner's wallet was missing, other valuable items were still in the house, like Tanner's rifles, which were hanging in the living room on a gun rack.

went to Tanner's house. The police asked Appellant about Tanner and C.J., and appellant told them that "children shouldn't be molested."

[Tanner's] call log records showed that Tanner was alive until at least 2:35 p.m. on November 10 because that is when he ended a phone call with his parents.[8] The records also showed that, between 3:28 p.m. and 4:16 p.m. the same day, Appellant's cell phone connected to the tower that "best served" Tanner's home. (According to the State, this is when Tanner was killed.) By 4:16 p.m., Appellant's cell phone had left the area, but it reentered the area at 12:41 a.m. on November 11. Appellant's phone was pinging in Tanner's coverage area until 12:44 a.m. From 12:44 a.m. to 2:11 a.m., there was no activity on Appellant's phone. At 2:11 a.m., the phone pinged a tower near the parking garage where police found Tanner's abandoned truck.

In January, a Tarrant County fire investigator told Plano detectives that an inmate named Thomas Uselton (Uselton) had information about the murder. Uselton told the detectives that he had known Appellant for a few years and that Appellant called him on November 10 around 2:00 p.m. or 3:00 p.m. because he wanted to buy drugs. According to Uselton, Appellant sounded "real hysterical, like real hyper." Uselton said that Appellant called him back later that day and asked him to help with "something" and that he agreed. Appellant rode with his ex-girlfriend [Vanessa Garcia] to Fort Worth to pick

---

[8] After the call ended, Tanner's phone did not connect to another tower until it was recovered by police.

up Uselton.[9] After they picked him up, she drove them to Appellant's tattoo parlor, where Appellant picked up some bleach and black latex gloves, then to Tanner's house. According to Uselton, when they entered Tanner's house, Appellant hugged him and told him that "[h]e's dead. We ain't got to worry about it." Uselton asked who was dead, but then he saw Tanner's body around the corner. Appellant said, "[T]hink about [y]our family, bro. You know what it is if you say anything." Uselton asked what Tanner did, and Appellant responded that "He molested a little girl." Uselton understood Appellant's comment as an admission that he killed Tanner. Uselton said that Appellant's ex-girlfriend picked them up at the parking garage in Irving where police found Tanner's abandoned truck. While Appellant and Uselton waited, Uselton "spray[ed] everything down with bleach." When Appellant's ex-girlfriend arrived, they went back to Appellant's tattoo shop. Uselton went to a nearby convenience store to buy some cigarettes and a drink. When he returned, he overheard Appellant's ex-girlfriend ask Appellant in another room, "Why did you do it?" He replied that he "had to."

Uselton told police other details about the crime that were not public. For example, he told police that appellant unplugged the garage-door opener at Tanner's house, that he helped Appellant cover up windows and the sliding

[9] Appellant had known his ex-girlfriend since high school, and they remained involved while Appellant and James dated. She testified that they were mostly just friends but that they were occasionally intimate. Appellant was planning to move in with her at the time of the murder.

glass door with blankets, and that he helped Appellant pour gas around the house.

Holder, 595 S.W.3d at 694-97.

Standard of Review

Non-constitutional errors require reversal only if they affect an appellant's substantial rights. *Gonzalez v. State*, 544 S.W.3d 363, 373 (Tex. Crim. App. 2018). This means that an error is reversible only when it has a substantial and injurious effect or influence in determining the jury's verdict. *Id.* If the reviewing court has a fair assurance from an examination of the record as a whole that the error did not influence the jury, or had but a slight effect, it will not overturn the conviction. *Id.* Stated another way, an error had a substantial and injurious effect or influence if it substantially swayed the jury's judgment. *Thomas v. State*, 505 S.W.3d 916, 926 (Tex. Crim. App. 2016).

In making this determination, the reviewing court examines the entire record and calculates, as much as possible, the probable impact of the error upon the rest of the evidence. *Coble v. State*, 330 S.W.3d 253, 280 (Tex. Crim. App. 2010). Courts consider: (1) the character of the alleged error and how it might be considered in connection with other evidence; (2) the nature of the evidence supporting the verdict; (3) the existence and degree of additional evidence indicating guilt; and (4)

whether the State emphasized the error. *Gonzalez*, 544 S.W.3d at 373. The reviewing court may also consider the jury instructions, the State's theory and any defensive theories, closing arguments and even voir dire, if applicable. *See Motilla v. State*, 78 S.W.3d 352, 355-56 (Tex. Crim. App. 2002).

Here, a review of the entire record provides a fair assurance that the admission of the CSLI evidence had only a slight effect on the jury's verdict and that, therefore, Appellant's substantial rights were not affected.

The Existence and Degree of Additional Evidence Indicating Guilt

Wholly apart from Appellant's CSLI records, the evidence demonstrated the following:

- Appellant had motive.[10]
    - Tanner had recently kicked Appellant out of his house. 5 RR 123-24.
    - When asked about an allegation that Tanner molested the daughter of Casey James, Appellant expressed strong feelings to police, saying "children shouldn't be molested." 7 RR 96-97; 8 RR 107.
    - Appellant's motive, according to police, was manifested as a crime of passion; Tanner was stabbed twenty times while alive and once post-

[10] *See Clayton v. State*, 235 S.W.3d 772, 781 (Tex. Crim. App. 2007) (motive is a circumstance indicative of guilt).

mortem and suffered blunt-force head trauma.[11] 5 RR 180-82, 190-91; 8 RR 108-09.

- Appellant had opportunity.[12]

    - Appellant knew James and her children (who shared the house with Tanner) would be out of town the weekend of November 9th through 11th. 5 RR 108-10, 134-35.

    - Appellant was privy to Tanner's habits—he did not use an alarm system or lock his doors and would be compromised by drinking on the weekend. 5 RR 112, 127; 8 RR 109-10.

- By involving Thomas Uselton, Appellant provided an eye-witness to his incriminating post-crime conduct.

    - Appellant enlisted Uselton to help after he murdered Tanner sometime after 2:35 p.m. on November 10th when Tanner ended a call with his parents. 6 RR 230-32; 8 RR 49-50.

    - Appellant and Uselton, stocked with bleach and black latex gloves, had Vanessa Garcia drive them to Tanner's house. 8 RR 51-53.[13]

---

[11] *See Nisbett v. State*, 552 S.W.3d 244, 267 (Tex. Crim. App. 2018) ("The defendant's culpable mental state may also be inferred from the extent of the victim's injuries.").

[12] *See id.* at 265 (opportunity and motive are evidence of guilt); *Merritt v. State*, 368 S.W.3d 516, 526 (Tex. Crim. App. 2012) (same).

[13] *See Guevara v. State*, 152 S.W.3d 45, 50 (Tex. Crim. App. 2004) (attempts to conceal incriminating evidence is probative of wrongful conduct and a circumstance of guilt).

- When Uselton saw Tanner's dead body, Appellant threatened him: "[T]hink about your family, bro. You know what it is if you say anything." 8 RR 53.[14]

- Appellant knew the reason Tanner was killed; when asked, he explained to Uselton: "He molested a little girl," which Uselton took "as an admission that he killed Tanner." 8 RR 54.[15]

- Uselton overheard Garcia ask him why he did "it," and he told her he "had to." 8 RR 64.

- Uselton's description of the crime scene and other related evidence were corroborated.

  - Uselton told police details about the crime not known to the public, e.g., the disengaged garage door, the covered sliding glass door, Tanner's missing wallet, and gasoline spread around the house. 5 RR 59, 88-89, 101, 142; 8 RR 18, 30, 34, 114.

  - Uselton said he saw Appellant stab Tanner's body in the neck. The medical examiner confirmed this had been done post-mortem. 5 RR 180, 187; 8 RR 58.

  - Uselton led police to the garage where they had already found Tanner's abandoned truck. 8 RR 26, 33-34.

  - Police found black latex gloves at the scene, as Uselton described. 5 RR 66; 8 RR 52-53.

---

[14] *See Wilson v. State*, 7 S.W.3d 136, 141 (Tex. Crim. App. 1999) (threats against a witness evidences a consciousness of guilt).

[15] *Holder*, 595 S.W.3d at 696.

- Appellant's DNA linked him to the crime scene despite his effort to incinerate it.[16]

    - Though Appellant tried to set the crime scene on fire, police found two black latex gloves in Tanner's kitchen that had not there before James left, and DNA testing showed that "it would be extremely unlikely that anyone other than [Appellant] was a major contributor from [the] three glove swabs." 5 RR 217; 8 RR 103-04.[17]

This evidence alone demonstrates that the CSLI was not "*the* crucial part" of the State's case, as the court of appeals wrongly concluded. *See Holder*, 2020 WL 7350627, at *7 (emphasis in original). Nor was it the foundation of the State's case, as Appellant has characterized it in prior briefing.

Indeed, regardless of the CSLI evidence, for the jury to acquit Appellant, it would have had to believe that Appellant did not kill Tanner but that he: took Uselton to the murder scene, knew the reason Tanner was killed, stabbed Tanner post-mortem, threatened Uselton, falsely confessed to Garcia and told her not to talk to the police, attempted to clean and cover up the murder, misled Uselton by indicating his responsibility for the murder in various implicit ways, and never told Uselton or

---

[16] *See Nisbett*, 552 S.W.3d at 266 (physical evidence can link a person to a crime).

[17] *Holder*, 595 S.W.3d at 695.

the police that someone else was responsible for Tanner's death. The erroneous admission of CSLI evidence would not have altered the guilt calculus for the jury.

The Nature of the Evidence Supporting the Verdict

In contrast to the moment-in-time location data of the CSLI, Uselton provided graphic and detailed testimony regarding his personal experiences with Appellant inside Tanner's house and provided an eyewitness account of Appellant's incriminating post-crime conduct. This post-crime conduct, told in narrative form, was highly persuasive. Attempts to conceal incriminating evidence is probative of wrongful conduct and is a circumstance of guilt. *See Guevara*, 152 S.W.3d at 49; *see also Nisbett*, 552 S.W.3d at 267. The record supports the strong, credible nature of Uselton's testimony because:

- He answered several questions raised by the crime and crime scene. 8 RR 12-13.
- His statements were corroborated by the physical evidence and other witnesses' testimony. 8 RR 30, 34.
- He was not an accomplice, and therefore, he was not inherently unreliable nor did his testimony have to be corroborated.[18] CR 505-10; *see Holder*, 2020 WL 7350627, at *5.

[18] *See Druery v. State*, 225 S.W.3d 491, 500 (Tex. Crim. App. 2007) ("[M]erely assisting after the fact in the disposal of a body does not transform a witness into an accomplice witness in a prosecution for murder."); *Zamora v. State*, 411 S.W.3d 504, 509 (Tex. Crim.

- He did not seek out the authorities to make a deal; instead, he shared his experience with another inmate and that inmate came forward to officials. 8 RR 29-30; 10 RR 143-47, 169-75.[19]

- The jurors had ample opportunity to judge Uselton's demeanor, as he testified in both the State's and Appellant's case in chief.

- Defense counsel challenged the credibility of Uselton's testimony based primarily on his criminal history rather than on his version of events.[20]

- Uselton was not given any deal for his testimony. 8 RR 72-73.[21]

- The State argued in closing: "[Y]ou could hear a pin drop in this courtroom" when Uselton testified, and "Every person in here was hanging on every last word that he said[.]" 13 RR 14.

- The jury sent out two notes asking about the specifics of Uselton's testimony, which arguably indicated they believed his version of events. The first one stated:

App. 2013) (the principle concern with accomplice-witness testimony is that the accomplice often has an incentive to lie in order to curry favor or shift blame).

[19] *Cf.* Tex. Code Crim. Proc. art. 38.075 (requiring corroboration for jailhouse-informant when imprisoned with the defendant).

[20] At the time of trial, Uselton was in custody for unauthorized use of a motor vehicle and theft. He had six prior felony convictions, including thefts, misdemeanor burglary of a vehicle, and a misdemeanor assault family violence. 8 RR 45-49.

[21] *See Giglio v. United States*, 405 U.S. 150, 154-55 (1972) (holding that the State must disclose any agreement with a witness that may affect the witness's credibility).

> In Thomas Uselton's testimony we would like the exact comments he made when he and [Appellant] arrived to the house and recounted for what [Appellant] said to him.
> Also Thomas's statement about what he overheard between [Appellant] and Vanessa [Garcia] after they left the crime scene and were at the tat[t]oo shop.

CR 500-01; 13 RR 77, 79-80 (second note elaborated on first).

Notably, Appellant's defensive theory did not dispute that Appellant was with Uselton inside Tanner's house on Sunday morning.[22] 10 RR 232 (defense counsel asked Uselton: "You did some bad things, right? [Appellant] did some bad and some wrong things, right?"); 13 RR 34-35 (in closing argument, defense counsel argued that Appellant and Uselton could be indicted for the things they did at the crime scene). In fact, Appellant's defensive theory was that he entered the crime scene for the first time only after Tanner was dead in order to clean and cover up for the actual assailant, whom he suggested was most likely Casey James (although it could have been others). While defense counsel challenged Uselton's credibility regarding certain accounts of what occurred and what was said inside Tanner's house, these challenges would have been undermined by Uselton's unchallenged

[22] Appellant did not testify.

statements that he and Appellant entered Tanner's house together and found Tanner dead.

Because the jurors could have, and likely did, believe most, if not all, of Uselton's testimony from listening to him, and because Uselton's testimony was corroborated by other witnesses and the physical evidence, the CSLI records were not what convinced the jury to believe Uselton or convict Appellant.

The Character of the Error and How it Might be Considered in Connection with Other Evidence

In broad terms, Appellant's cellphone records served three primary purposes:

> (1) to show that Appellant's cellphone was hitting off the cellphone tower that best served Tanner's home when the murder may have occurred;
>
> (2) to show that Appellant's statements regarding his whereabouts on Saturday November 10 were inconsistent with the cellphone records; and
>
> (3) to corroborate witness testimony, including Uselton's.

Each purpose addressed below begins with a summary of the CSLI evidence offered during this eight-volume trial, followed by an analysis of how it fit into the larger trial.

Appellant was in the Area of Tanner's House when the murder may have occurred:

At trial, the State called an AT&T engineer to show that, on Saturday, November 10, 2012, Appellant's cellphone connected to a tower that was located a little over a half mile from Tanner's Plano home and that best served Tanner's address. 7 RR 6-7, 34-47, 60-64, 73-74; SX 51. Using the cell tower information and maps, a detective testified to Appellant's movement that weekend, including the location of Appellant's cellphone near Tanner's house on Saturday afternoon. 7 RR 99-101, 105-06, 117-19; SX 57, 60.

The State's general theory was that Tanner was killed sometime between 2:35 p.m. on November 10, when Tanner ended a phone call with his parents, and 8:00 p.m. that night, when a call came in and went straight to voicemail, as did every call after that. 13 RR 17 ("So we know that the murder occurred sometime between 2:35 and 8:00 p.m.[]"). In light of Appellant's cellphone records that showed that his phone was in the area of Tanner's neighborhood between 3:18 and 4:16 p.m. on Saturday, the State's more specific theory was that Appellant killed Tanner during that time. 7 RR 94. In essence, the State relied on the CSLI evidence to show that Appellant had the opportunity to kill Tanner because he was in the area of Tanner's house at a time when Tanner could have been killed.

Defense counsel argued that there was no definitive evidence of when Tanner was killed, and he went so far as to say that James could have killed Tanner on Friday morning before she went out of town.[23] 13 RR 35-36. Specifically, defense counsel argued that it was "very important" that the medical examiner, Dr. Rohr, did not provide a timeframe for Tanner's time of death because "if they can't put him dead, Bill Tanner deceased, at a certain day even, it doesn't matter whose phone records show who was where doing what." 13 RR 41.

Also, the records neither conclusively established that Appellant was inside Tanner's house on Saturday afternoon nor ruled out the possibility that he was simply in the general area and/or passing through. As defense counsel argued in closing argument: "There's no witnesses to [Appellant] being anywhere near that house in the broad daylight on a Saturday afternoon." 13 RR 49. Counsel also argued that none of Tanner's neighbors' surveillance cameras captured Appellant or any car associated with him drive down Tanner's street. 13 RR 50. At most, the CSLI records showed Appellant was driving in the area of Tanner's house on Saturday at a time when Appellant could have killed Tanner.

---

[23] In light of this theory, the broadest timeframe for Tanner's murder would have been Friday morning to late Saturday night or early Sunday morning when Appellant picked up Uselton and went to Tanner's house.

In contrast and more importantly, Thomas Uselton's testimony provided much more definitive and incriminating evidence that Appellant had been *inside* Tanner's house *at some point before* Uselton and Appellant entered the house together late Saturday night or early Sunday morning. Through his testimony, Uselton established:

- Appellant knew exactly where Tanner's body was located immediately upon entering the house and walked directly to it.[24]

- Appellant knew, even before he went in the house, what he would need to clean up the crime scene, indicating he had been there before.

- Appellant was relieved (as opposed to shocked) to find that Tanner was actually dead.[25]

- Appellant knew without hesitation why Tanner had been killed.[26]

- Appellant threatened Uselton not to tell anyone.[27]

---

[24] *See* 8 RR 53 (Appellant walked "towards the master bedroom and the garage"); 8 RR 147 (officer testified Tanner's body was inside the master bedroom doorway); 5 RR 60 (officer testified that inside garage door was near the master bedroom).

[25] *See* 8 RR 53 (Appellant hugged Uselton, and said: "He's dead. We ain't got to worry about it.").

[26] *See* 8 RR 54 (When Uselton asked what Tanner had done, Appellant responded: "He molested a little girl.").

[27] *See* 8 RR 53 (Appellant said: "Look, think about your family, bro. You know what it is if you say anything.").

• Appellant showed personal animus by stabbing the body post-mortem.[28]

• Appellant confessed to Garcia.[29]

This evidence, more than the CSLI records, discredited Appellant's defensive theory that he entered the crime scene for the first time to clean up after someone else had killed Tanner. It also greatly diminished the significance of the CSLI in tying Appellant to within half a mile of the victim's house during a plausible timeframe in which the murder may have occurred. After listening to Uselton, it would have been obvious to the jury that Appellant killed Tanner sometime before he entered the house with Uselton.

Appellant's Cellphone Records Exposed His Lies About his Whereabouts that Weekend:

Two detectives testified that Appellant's timeline he gave for his whereabouts was not consistent with his cellphone records. They both testified that, when they confronted Appellant with the CSLI records showing that he was in Tanner's coverage area multiple times that weekend, which contradicted his timeline, Appellant changed his story and said he was in a different area of Plano to buy

---

[28] 8 RR 58.

[29] 8 RR 64 (Appellant told Garcia that he "had to" do it).

drugs.[30] 7 RR 85-93; 8 RR 99, 105-06. Appellant said that the last time he had been to Tanner's house had been when Tanner asked him to move out a week or so earlier. 7 RR 93. The State also played the video of Appellant's interview. 7 RR 128; SX 65A.

During the interview, Appellant uttered numerous other lies that were equally if not more incriminating, including:

- He learned of Tanner's death on Facebook;
- He had no idea what happened to Tanner;
- The last time he had been in Tanner's house was two weeks before the murder;
- He had never driven Tanner's truck.

SX 65A at 1:50-2:30, 5:48-6:15; *see* 7 RR 94. The contradictions between the CSLI records and Appellant's alleged whereabouts were more important to the *investigation* than to the jury. The investigators did not initially have Uselton, but the jury did. Appellant's lie that he had not been *inside* Tanner's house for two weeks was more damaging than his lie that he had not been *in the Plano area near*

[30] Although Appellant eventually said he was in Plano Saturday afternoon, the location he identified was several miles away from where the CSLI showed him to be; thus, his statement did not convey the same information as the CSLI.

Tanner's house on Saturday. In short, Appellant's credibility was seriously undermined by other incriminating evidence. *See Gonzalez*, 544 S.W.3d at 375 (finding no harm in the admission of evidence of Gonzalez's drug use and noting that it was "not the only evidence that called [his] credibility into question").

Appellant's Cellphone Records Corroborated Uselton's Testimony:

Regarding Appellant's whereabouts throughout the weekend of November 10 and 11, Uselton testified about Garcia (with Appellant in charge) getting him in Fort Worth, stopping by Appellant's Irving tattoo parlor, dropping them off at Tanner's Plano house, meeting them hours later at the parking garage near Irving, where they abandoned Tanner's truck, and driving them to Appellant's tattoo shop. 8 RR 49-53.

Utilizing Appellant's cellphone records and maps, Detective Pfahning testified as to the location of Appellant's cellphone at significant times throughout the weekend. 7 RR 99-100, 105, 107-12, 120-22; SX 57, 61, 62. [31] Also, two detectives testified that much of what Uselton said could be corroborated with some of Appellant's cellphone records. 8 RR 32, 116.

[31] State's Exhibits 60-64 were "blowups" of the maps in State's Exhibit 57, and they are not contained in the exhibit volume. *See* 7 RR 111-12, 114.

But in virtually the same way as Appellant's CSLI's records, Garcia's testimony and her cellphone records corroborated Uselton's testimony that:

- she and Appellant picked up Uselton Saturday night in Fort Worth,
- they drove to a residential neighborhood in Plano,
- Appellant and Uselton got out of the car, and she went home,
- early the next morning she picked up Appellant and Uselton near a parking garage near Irving in Las Colinas. 7 RR 159-67.
- Garcia's cellphone records showed that at 2:15 a.m. on Sunday, her phone was in the area where Tanner's truck was later recovered. 7 RR 113, 123.

Further, Uselton's account was corroborated by the physical evidence and the fact that he knew details about the crime scene that had not been made public, including that he knew:

- the location of Tanner's home;
- there were black latex gloves in Tanner's house;
- Tanner had been stabbed post-mortem;
- the electric garage-door had been unplugged;
- the windows and the sliding glass door were covered with blankets;
- gasoline had been poured around the house;
- Tanner's wallet had been stolen;

• Tanner's red truck had been stolen and left in a garage near Irving;

• the motive for the murder was child-molestation allegations.

5 RR 127-30; 8 RR 30, 33-34, 37, 53, 107.

While the cellphone records were objective evidence that supported Uselton's testimony, the records' impact was not substantial in light of the above evidence. *See Coble*, 330 S.W.3d at 282 (holding that any error in the admission of evidence may be rendered harmless when substantially the same evidence is admitted elsewhere).

The State's Jury Arguments

In finding harm in its opinion on remand, the court of appeals determined that the State's jury arguments demonstrated a heavy reliance on Appellant's CSLI. *Holder*, 2020 WL 7350627, at *5-7. In doing so, the court quoted the arguments relating to the CSLI without providing any context, thereby creating the impression that the State spent the majority of its time emphasizing the CSLI. The court presented a distorted view of the arguments.

While the State relied on and discussed the CSLI evidence in argument, it presented the evidence as one of many pieces of a puzzle. Although the State

referred to the CSLI several times, it similarly referred to the other pieces of the puzzle multiple times.

Opening Statement

The State chronologically detailed how the investigation unfolded and how the pieces of the puzzle came together to reveal Appellant as the primary suspect. The State highlighted seven puzzle pieces in the order they popped up in the investigation:

(1) Crime scene. 5 RR 14-17, 29;

(2) Motive. 5 RR 17-21, 29-30;

(3) Opportunity (exclusive of CSLI evidence); 5 RR 21.

(4) CSLI. 5 RR 22-24;

(5) DNA. 5 RR 24-25;

(6) Uselton. 5 RR 25-29; and

(7) Garcia. 5 RR 27-28.

In conclusion, the State asserted:

> So what you're going to hear is the physical evidence, the DNA, the cellphone towers, that by themselves put the defendant in that crime scene. And then you're going to hear from people who, without a doubt, had flies, and on their own are reason enough not to believe them, but the corroboration of their story with different people, with cellphone tower records, DNA, it will all come together.

> * * *
> It may be hard to follow, but this is one of those cases that, as we go through, you're going to have a little piece here, a little piece here, and it will eventually come together, and you will see the big picture[.]

5 RR 28-29.

Opening to the Closing Argument

The State began by emphasizing that Tanner's death was not a random act of violence and that Appellant had the motive to kill Tanner. It then argued:

> [T]here's a lot of evidence, a lot of things that point towards the defendant committing this crime in this case. There's the physical evidence. There's the phone records. And then there's testimony.
> * * *
> [T]here's several witnesses that testified in this case, each offering something a little different, another piece of evidence here and there, another thing that points the finger at the defendant, another thing that shows the defendant committed this crime. But perhaps no testimony was more important, no testimony more powerful, than that of Thomas Uselton.

13 RR 13-14. The State then:

- twice highlighted Uselton's testimony and the corroborating evidence supporting it, including the phone records. 13 RR 14-17, 21-23;
- reiterated that Appellant's cellphone records discredited Appellant's statements, showed him near Tanner's house, and corroborated Uselton's testimony. 13 RR 17-21;
- again raised the puzzle analogy. 13 RR 25-26;
- ended by ruling out the other suspects and emphasizing Appellant's motives. 13 RR 26-30.

State's Final Closing Argument

After rebutting defense counsel's theories regarding other suspects, 13 RR 54-60, the State:

- highlighted Appellant's motives and opportunity (exclusive of the CSLI) to kill Tanner. 13 RR 61-65;
- discussed Appellant's travel on Saturday and the fact he was near Tanner's house for an hour, late in the afternoon. 13 RR 66-67;
- emphasized Appellant's different lies. 13 RR 67-68;
- argued that Appellant changed his alibi due to the cellphone records. 13 RR 68-69;
- noted that Appellant convinced Garcia to lie for him. 13 RR 69;
- discredited Appellant's theory that his only involvement was entering Tanner's house to clean and cover up the murder. 13 RR 70;
- discussed several reasons why Appellant's DNA on the black latex gloves connected Appellant to the crime scene. 13 RR 71-72;
- argued that Appellant, not other peripheral suspects, killed Tanner. 13 RR 72-74.

While the State discussed the CSLI records in argument, the records were not the focal point of the argument or the State's case. The linchpin of the State's case was Uselton and the non-CSLI evidence corroborating his testimony, which the closing arguments plainly demonstrate.

Conclusion

As the State's evidence and jury arguments reveal, while the cellphone records were a part of the State's case, they were not the crucial piece, nor even a necessary piece. Instead, it played a supporting or cumulative role to other, more persuasive evidence. Indeed, the non-CSLI evidence indicating guilt was abundant, strong, and credible. Thus, the erroneous admission of the CSLI evidence did not affect Appellant's substantial rights, and Appellant was not harmed when the trial court failed to suppress his CSLI records under Article 38.23(a). *See* TEX. R. APP. P. 44.2(b).

PRAYER FOR RELIEF

The State of Texas prays that the Court of Criminal Appeals reverse the court of appeals, find the error harmless, and affirm Appellant's conviction, or, in the alternative, remand to the court of appeals for a harm analysis under the proper standard.

Respectfully submitted,

STACEY M. SOULE
State Prosecuting Attorney

/s/ Emily Johnson-Liu
Assistant State Prosecuting Attorney
Bar I.D. No. 24032600
P.O. Box 13046
Austin, Texas 78711
information@spa.texas.gov
512/463-1660 (Telephone)
512/463-5724 (Fax)

GREG WILLIS
Collin County Criminal District Attorney
Collin County, Texas

/s/ Libby Lange
Assistant Criminal District Attorney
Bar I.D. No. 11910100
2100 Bloomdale Rd., Suite 200
McKinney, Texas 75071
llange@co.collin.tx.us
972-548-4323 (Telephone)
214-491-4860 (Fax)

CERTIFICATE OF COMPLIANCE

The undersigned certifies that according to Microsoft Word's word-count tool, this document contains 9,508 words, exclusive of the items excepted by TEX. R. APP. P. 9.4(i)(1).

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

CERTIFICATE OF SERVICE

The undersigned certifies that on this 14th day of June 2021, the State's Brief on the Merits was served electronically or by electronic mail to Steve Miears, Counsel for Christopher Holder at stevemiears@msn.com.

/s/ *Emily Johnson-Liu*
Assistant State Prosecuting Attorney

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Stacey Soule on behalf of Emily Johnson-Liu
Bar No. 24032600
information@spa.texas.gov
Envelope ID: 54401047
Status as of 6/15/2021 8:15 AM CST

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
John ROLATER		jrolater@co.collin.tx.us	6/14/2021 4:39:24 PM	SENT
Libby Lange		llange@co.collin.tx.us	6/14/2021 4:39:24 PM	SENT
Steve Miears		stevemiears@msn.com	6/14/2021 4:39:24 PM	SENT